

OFFICE ACTION

Request for Continued Evaluation

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5/4/10 has been entered.

Response

2. The Applicant amended at least the independent claim 5 in the response file 5/4/10, hence the rejection of record is withdrawn and a new rejection established in the subsequent paragraphs.

Restriction

3. Newly submitted claims 29-42 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: Independent claims 29 and 41 apply two stimuli to the heart, one is excitatory stimuli and the second is non-excitatory stimuli. The invention originally claimed comprising independent claim 5, established protocol where two non-excitatory pulses are applied to the heart.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 29-42 are withdrawn from consideration

Art Unit: 3766

as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

5. Claims 5 and 10-21, 23 and 25 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Patent No. 5,800,464 to Kieval (hereafter Kieval).

Kieval discloses the contents of an article from 1994 that teaches an improvement in cardiac output results when heart tissue is treated using anodal and cathodal stimulation. This stimulation conducted during normal sinus rhythm hyperpolarizes the cardiac cell and increases the calcium that is released hence placing this stimulated area of the heart in a refractory period where no cardiac cells in this area can be stimulated. The pulses that hyperpolarize the cells are

Art Unit: 3766

read to be non-excitatory stimuli. The pulse delivery parameters are read to be different for each electrode as the polarity of the two electrodes are positive and negative respectively. It is accepted other parameters such as heart rate and contractility can be varied over time to effect, both increase and decrease, the heart function. The invention is deemed operable in all four cardiac chambers. The impact of the stimulation on arrhythmia is not addressed by Kieval. (column 1, lines 19-40; and column 3, lines 15-31).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Fran Oropeza whose telephone number is (571) 272-4953. Fran's schedule is Monday and Tuesday 9AM-7PM EST. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carl. H. Layno can be reached on (571) 272-4949. Carl's schedule is Monday, Wednesday, Friday 9AM-5 PM EST; Tuesday, Thursday 9AM-3PM and 9PM-11PM EST. The fax phone numbers for the organization where this application or proceeding is assigned is (571) 273-8300 for regular communication and for After Final communications.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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Application/Control Number: 10/039,845
Art Unit: 3766

Page 5

September 29, 2010

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